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Date of Decision: 8th November 1995

CRIMINAL APPEAL NO. 731 OF 1989

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA
and
HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment? No

2. To be referred to the Reporter or not? No

3. Whether their Lordships wish to see the fair copy of judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

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Shri A.A. Chandiwala, Advocate, for the Appellant

Shri S.T. Mehta, Addl. Public Prosecutor, for the Respondent

CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.
(Date: 8th November 1995)

ORAL JUDGMENT (per Divecha, J.)

The judgment and order of conviction of the appellant under sec. 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (the NDPS Act for brief) as also under sec.

66(1)(b) of the Bombay Prohibition Act, 1949 (the Prohibition Act for brief) and sentence of rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default of which simple imprisonment for one year under sec. 20(b)(ii) of the NDPS Act awarded by the learned Additional Sessions Judge at Surat by his judgment and order pronounced on 20th October 1989 in Sessions Case No. 51 of 1989 is under challenge in this appeal.

2. It is not necessary to set out in detail the facts giving rise to this appeal. It may be sufficient to note that during his patrolling errand in the company of his staff the police Sub-Inspector of the police station of Mahidarpura at Surat on the basis of prior information found the appellant standing opposite Satlaj Hotel near the Ayurvedic Hospital and on the search of his person he was found to be possessing a bag containing 250 gms. of what is popularly known as charas (cannabis sativa). The appellant was not found possessing any pass or permit in that regard. Thereupon the bag with its contents was seized from him. The contents were put in a parcel and it was sealed. Later on it was sent to the forensic science laboratory for analysis and report. At the end of investigation, the charge-sheet was submitted before the Sessions Court at Surat. The case was registered as Sessions Case No. 51 of 1989. It was assigned to the learned Additional Sessions Judge for trial and disposal. The charge was framed against the appellant on 5th June 1989 at Exh.2 on the record of the case. The appellant did not plead guilty to the charge. He was thereupon tried. After recording evidence and recording the statement of the accused under sec.313 of the Code of Criminal Procedure, 1973 (the Code for brief), by his judgment and order pronounced on 20th October 1989 in Sessions Case No. 51 of 1989, the learned trial Judge convicted the appellant under sec. 20(b)(ii) of the NDPS Act and also under sec. 66(1)(b) of the Prohibition Act and sentenced him to rigorous imprisonment for 10 years and fine of Rs. 1 lakh in default of which simple imprisonment for one year under the aforesaid statutory provision of the NDPS Act without awarding any separate sentence for the offence punishable under the Prohibition Act. That aggrieved the appellant and he has therefore invoked the appellate jurisdiction of this court by means of this appeal.

3. The conviction of the appellant under sec. 20(b)(ii) of the NDPS Act cannot be sustained in law in view of the binding ruling of the Supreme Court in the case of Saiyad Mohd. Saiyad Umar Saiyad and Others v. State of Gujarat reported in 1995 Supreme Court Cases (Cri) at page 564. It has been held therein that it is incumbent upon the officer acting under sec. 42 of the NDPS Act to ascertain from the person concerned whether or not he would like to be searched in the presence of a gazetted officer or a magistrate under sec. 50(1) thereof. It transpires from the material on record that this requirement of

law has not been satisfied in this case. In that view of the matter, the conviction of the appellant under the NDPS Act cannot be sustained.

4. So far as the conviction under the Prohibition Act is concerned, it cannot be sustained for one very good reason to the effect that the seal applied on the packet containing the charas recovered from the appellant at the relevant time was found to be illegible as transpiring from the report of the forensic science laboratory at Exh. 14 on the record of the case. It further transpires therefrom that a specimen of the seal applied did not accompany the sealed packet. In absence of a specimen of the seal used for sealing the packet of the obnoxious substance, the office in-charge of the forensic science laboratory had no opportunity to compare the seal on the packet with the specimen seal. That would raise a serious doubt whether or not the contents of the packet were the same as recovered from the appellant at the relevant time. That would render the report of the forensic science laboratory at Exh. 14 on the record of the case unreliable. If that report is not relied on, there is no cogent or convincing evidence on record to show or to suggest that what was recovered from the appellant at the relevant time was what is popularly known as charas. In that case, the prosecution cannot be said to have brought the guilt home to the accused with respect to the office punishable under sec. 66(1)(b) of the Prohibition Act beyond any reasonable doubt. In the result, the conviction of the appellant thereunder also cannot be sustained in law.

5. It must be fairly stated at this stage that Shri Chandiwala for the appellant has urged several points in support of this appeal with respect to the conviction of the appellant both under the NDPS Act and the Prohibition Act. Since we are of the opinion that the appellant's conviction under both the enactments cannot be sustained on the aforesaid grounds, we have not chosen to deal with all his submissions in extenso.

6. In view of our aforesaid discussion, we are of the opinion that the appellant's conviction under the NDPS Act and under the Prohibition Act cannot be sustained in law. The impugned judgment and order of conviction and sentence passed against the appellant cannot therefore be sustained in law.

7. In the result, this appeal is accepted. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Surat on 20th October 1989 in Sessions Case No. 51 of 1989 is quashed and set aside. The appellant is ordered to be released forthwith if no longer required in any other case.
